In the Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1901.

No. 85.

Tomas C. Gutierres, et al.,
Appellants,
vs.
Albuquerque Land & Irrigation Company.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

This case is brought into this Court under the second section of the Act of March 3, 1885, (*23 Stats., 443*), it being a case wherein is called in question the "validity of a treaty" of the United States and "of an authority exercised under the United States." The appellee company is incorporated under an act of the legislative assembly of the Territory of New Mexico, approved February 24, 1887, the material portions of which are here set out:

> "Section 1. Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water for the purpose of irrigation, mining manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith; for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the territory, or some person authorized by law to take acknowledgment of conveyances of real estate, and when so acknowledged, such articles shall be filed with such secretary.
>
> "Sec. 2. Such articles shall set forth:
>
> 1. The full names of the incorporators, and the corporate name of such company.
>
> 2. The purpose or purposes for which such company is formed; and if the object be to construct reservoirs and canals, or ditches and pipe lines for any of the pur-

poses herein specified; the beginning point and terminus of the main line of such canals and ditches and pipe lines; and the general course, direction and length thereof shall be stated.

3. The amount of the capital stock and the number of shares as definitely as practicable.

4. The term of existence of the company, which shall not exceed fifty years.

5. The number of directors, and the names of those who shall manage the business of the company for the first year.

6. The name of the city or town and county in which the principal place of business of the company is to be located.

"Sec. 17. Corporations formed under this act for the purpose of furnishing and supplying water for any of the purposes mentioned in section one, shall have, in addition to the powers hereinbefore mentioned, rights as follows:

1. To cause such examination and surveys for their proposed reservoirs, canals, pipe lines and ditches to be made as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by their officers, agents and servants to enter upon the lands or water of any person, or of this territory.

2. To take and hold such voluntary grant of real estate and other property, as shall be made to them in furtherance of the purposes of such corporation.

3. To construct their canals, pipe lines or ditches upon or along any stream of water.

4. To take and divert from any

stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided: And provided, further: That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same when so diverted.

5. To furnish water for the purposes mentioned in section one, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

6. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies.

"Sec. 25. That no incorporation of any company or companies to supply water for the purposes of irrigation and other purposes, shall have any right to divert the usual and natural flow of water of any stream which by the law of 1854 has been declared a public acequia, for any use whatever, between the fifteenth day of February and the fifteenth day of October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream or public acequia, and to be irrigated by the water furnished by said stream or public acequia, and that no incorporation of any company or com-

panies shall interfere with the water rights of any individual or company, acquired prior to the passage of this act."

Laws of 1887, page 29.

Compiled Laws of 1897, ss. 462, et seq.

It is claimed by appellants that so much of the act above quoted as purports to authorize, and as is held by the court below to authorize, the appellee to divert the "surplus" waters of the Rio Grande through its canal, is in direct conflict with the legislation of Congress on the same subject.

The legislation of Congress to which reference is made, is here set out:

"Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

"Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights,

as may have been acquired under or recognized by the preceding section."

Rev. Stats. U. S., Secs. 2339 and 2340.

Section 1, of the act of 3d of March, 1877, known as the Desert Land Act:

"That it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such,' and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter.

Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation: *and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.*"

1st Supp. Rev. Stats., 137.

Section 4, of the act of 3d of March, 1891, as follows:

"Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigation and reclaiming all of said tracts, and may file a joint map or maps, showing their plan of internal improvements."

1 Supp. Rev. Stats., page 940.

Section 18, of the same act, may shed light upon the subject.

"Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior, a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone, necessary for the construction of such canal or ditch.

> Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation.
>
> And the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."
>
> *1st Supp. Rev. Stats., page 946.*

It is also claimed by appellants that this legislation invades rights guaranteed by Articles VIII and IX of the treaty, commonly known as the treaty of Guadalupe Hidalgo, which contains the following provisions:

> "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States."
>
> "Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and

in the mean time shall be maintained and protected *in the free enjoyment of their liberty and property*, and secured in the free exercise of their religion without restriction."

It is further urged by appellants that this legislation is prohibited by Section Seven of the Organic Act of the Territory as follows:

> "Sec. 7. And be it further enacted, that the legislative power of the Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands of other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." (9 *Stats.*, 449).

Appellants further insist that this legislation is not a reasonable exercise of the grant of legislative power contained in the section above quoted, but on the contrary that it is so unreasonable that this court may declare it void, even if the other objections urged against it are not well founded.

These various questions are presented upon this record thus:

The appellee, having filed articles of incorporation under the Territorial statute (*Transcript, p. 9-10*), was proceeding to make a survey of a pro-

posed route for its canal when its engineering corps was driven off the lands of appellants and their associates by force, whereupon appellee filed its complaint in the district court of Bernalillo county, and obtained a temporary injunction restraining the appellants by name and their "agents, confederates and assistants,"

> "from hindering, preventing, obstructing and delaying the plaintiff, the Albuquerque Land and Irrigation Company, its agent, servants and employes, from proceeding with the examination and survey by obstructing, preventing and hindering their entrance upon and along lands lying and being at, near and along a proposed route for a canal, ditch and pipe line, beginning at a point on the east bank of the Rio Grande south or near the Indian Pueblo of San Felipe in the County of Bernalillo and Territory of New Mexico, and the terminus of said main line to be at a point south near the railway bridge of the Atchison, Topeka and Santa Fe Railway, at Isleta, also in said County of Bernalillo. The general course and direction of said line being southerly, east of the east bank of the said river along and under the foothills through the city of Albuquerque and the length thereof estimated to be thirty-five miles, more or less."

In its complaint, appellee grounded its right to enter upon the lands of appellants, to exercise the power of eminent domain, in other words, solely upon the allegations that it was incorporated under the act referred to and that it intended in good faith to construct a canal.

Appellants by their answer justify their refusal to permit the survey of their lands for reasons some of which are eliminated on this review but which may be summarized thus:

First: That appellee is not the owner of any irrigable lands along the line of the proposed canal, nor is it the owner of any reservoir site or other place for the holding or storing of water, nor is it the owner of any water-right by or under which it can obtain water for its proposed canal, when completed; nor has it any employment to carry or deliver water through its canal, when completed, to any persons having a right to use the same for the purpose of irrigating lands owned or occupied by them.

Second: That appellee intends to divert the waters of the Rio Grande through its canal for the purpose of selling said water for speculative purposes and for pecuniary profit and will claim title to all waters which may be diverted through its said proposed canal.

Third: That appellee has not the capital necessary to pay for the right of way for its canal, even if it had the right to secure such right of way by condemnation. (Eliminated.)

Fourth: That appellants and their associates, to the number of many thousands of people, and their several ancestors, grantors and predecessors in title, for more than fifty years, have used the waters of the Rio Grande to the extent of their entire flow and there are no surplus waters of the

said Rio Grande subject to be diverted through the proposed canal of appellee. (Eliminated as to the claim that there are no surplus waters by courts findings of fact.)

Fifth: That the Rio Grande is one of the streams referred to in Section XXV of the act under which the appellee is incorporated and that the waters of said Rio Grande are within the restrictions of said section and are therefore not subject to be diverted by appellee. (Eliminated.)

Sixth: That by the laws of Spain and Mexico the predecessors in title of the appellants had a vested right to use all of the waters of the Rio Grande for purposes of irrigation, that such right was protected and guaranteed by the treaty of Guadalupe Hidalgo and is not subject to be impaired by any law of the Territory of New Mexico.

Seventh: That by the laws of the United States, in force at the time of the passage of the act under which appellee is incorporated, no title to the waters of any natural stream, not navigable, could be acquired for any purpose whatever, but only a right of use of such waters for irrigating, mining or manufacturing may be acquired. That the right to divert the natural flow of the waters of any such stream for purposes of irrigation, is incident to the ownership or occupation of lands and that the right to divert such waters for purposes of sale cannot be acquired.

The appellants reiterated the affirmative allegations of their answer in a cross-complaint against appellee by which they sought to enjoin the appel-

lee from attempting to exercise the right of eminent domain as to their lands and the lands of their associates. The issues being made up by an answer to the cross-complaint and by replications filed by both parties, the case was sent on change of venue to Santa Fe county and was there tried by the district judge without the intervention of a jury. A large amount of testimony was taken, chiefly directed to the question of the existence of surplus and unappropriated waters of the Rio Grande but this evidence was not before the supreme court of the Territory and is, of course, not brought here.

The findings of fact made by the trial court were adopted by the supreme court and will be found on pages 34, 35 and 36 of the transcript. These findings of fact are not responsive to all of the issues in the case but we may concede that they tend to establish the existence of "surplus" waters in the Rio Grande within the meaning of the act in question, which concession renders it unnecessary to consider the first thirteen of said findings.

As the case in this court is conceived by counsel for appellants, we are concerned with only the fourteenth, fifteenth, sixteenth and eighteenth findings. They are as follows:

XIV.

> The court finds that there is no evidence that plaintiff relies on any source of water supply other than the Rio Grande or that the proposed canal of plaintiff is

expected or intended to receive and distribute stored waters.

XV.

That the plaintiff is not the owner of any lands along the line of its proposed canal or elsewhere.

XVI.

That there is no evidence that plaintiff has any contract with or employment by any person who is the owner of lands irrigable from said proposed canal for the conduct of water upon any such lands, or that any owner of lands not now irrigated from existing acequias, desires or intends to irrigate such lands from plaintiff's canal when completed.

XVIII.

That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal.

(*Trans., pp. 35-36*).

From the facts found the trial court concluded as matter of law, and the supreme court affirmed these conclusions, as follows:

I.

That the plaintiff corporation is entitled to exercise the power of eminent domain.

II.

That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under

which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners.

III.

That the defendants, at the time of the filing of the complaint herein unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated.

IV.

That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was affected at a point below the mouth of the proposed canal of plaintiff.

V.

That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the treaty rights of defendants are immaterial.

VI.

That the plaintiff is entitled to the relief demanded in the complaint, includ-

ing a perpetual injunction as prayed for.

VII.

That defendants are not entitled to any part of the relief demanded in their cross-complaint but the same should be dismissed.

(*Trans., pp. 36-37*).

Both the trial court and the supreme court refused to give any consideration to the rights set up by appellants under the treaty of Guadalupe Hidalgo. From the opinion sent up with the transcript it appears that both courts supposed appellants to be contending for the proposition that lands which were held in private ownership, prior to the treaty of cession, were not subject to condemnation for public uses under the laws of the Territory.

I quote from the opinion:

"Upon the other allegations of defendants as to treaty rights, I am of the opinion that the lands of citizens of New Mexico, since the cession, are subject to the operation of the law of eminent domain under the laws of the United States, and the States and Territories thereof, and not exempt therefrom by virtue of the treaty of Guadalupe Hidalgo. The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights and adjusted the system to the different sections of the the country as necessity required, and the laws of the States and Territories are in harmony therewith. These laws must govern wherein they differ from the treaty

provisions, and wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the States and Territories are ample for the protection of the rights of appropriators of water in this Territory, and remedies for impairment or destruction of such rights, are adequate also."

(*Trans., p. 60*).

The rights sought to be set up, which are disposed of, are:

X.

Further answering these defendants aver that they are advised by counsel and believe and therefore charge that by the laws of the Republic of Mexico in force at the time of the acquisition of the Territory of New Mexico by the United States of America (as well as by the laws of Spain when the present Territory of New Mexico was subject to the dominion of the Spanish crown) the owners of lands adjacent to any stream of water not navigable were permitted to appropriate the waters thereof or so much of said waters as might be necessary for the irrigation of their lands and for their animals and other domestic purposes and by such appropriation of said water the owners of such lands acquired a right to divert the same from their usual and natural course and to apply the same to the irrigation of their lands and for the domestic purposes incident to cultivation of the soil. And these defendants further aver that their ancestors, grantors and predecessors in title, were owners and proprietors of lands adjacent to the Rio Grande at the time of the acquisition of the Territory of New Mexico by the United States of America and had

acquired, prior to such acquisition of the said Territory of the United States, the right to irrigate their lands with the waters of the Rio Grande and had acquired a vested right to use and divert the entire flow of the said waters of the Rio Grande through ditches or acequias constructed and maintained by them for the purpose of irrigating their said lands, nearly all of which lands are now owned by these defendants and their associates and these defendants are advised by counsel and believe and therefore charge that the right to the use of the waters of the Rio Grande so acquired by the ancestors, grantors and predecessors in title, of these defendants, under the laws of Spain or of the Mexican Republic, are appurtenant to the said lands to the irrigation of which the said waters were so applied and as such pass by the conveyance or descent of the said lands and are fully guaranteed and protected by the terms of the treaty between the United States of America and the Republic of Mexico, known as the treaty of Guadalupe Hidalgo, and are not subject to be impaired or divested by any law of the United States or of the Territory of New Mexico and these defendants therefore aver that any law of the Territory of New Mexico which purports in any manner to impair or restrict any of said rights is void and of no effect, and no person or corporation can by virtue of any such pretended law, interfere with the rights of these defendants and their associates, so acquired by their ancestors, grantors and predecessors in title under the laws of Spain and Mexico, as hereinbefore alleged and set forth.

(*Trans., pp. 15–16.*)

Appellants have never contended that their lands may not be taken for public use under the power of eminent domain because of any stipulations of the treaty relied on, neither do they contend that Congress may not nullify a treaty. They do contend, however, that the legislature of the Territory of New Mexico can not do so. They insist that when, in a court of justice, a litigant on one side sets up a right, claimed under an act of a territorial legislature and a litigant on the other side makes the contention that such act invades a right guaranteed by a treaty of the United States, it devolves upon the court to examine the act and the treaty and to determine whether or not the contention thus made is well founded, and, if such contention be well founded, to declare the act of the legislature void. They further contend that for the purpose of this review, every fact alleged in paragraph ten of the answer above quoted, which is well pleaded, must be taken as true.

The conclusion of law numbered four as follows:

> IV.
>
> That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff.
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> (*Trans., p. 36.*)

Appears to find its support in the following language of the opinion:

> "The defendants seek to defend, not only on behalf of themselves, but also on behalf of their grantors, ancestors and others 'to the number of many thousands,' and allege that for centuries, in some instances, their grantors and ancestors had used the waters of the Rio Grande and had secured rights under the laws of Spain and Mexico, guaranteed to them by the treaty of Guadalupe Hidalgo, to the full extent of the flow of said river during the planting and growing season, etc.
>
> As to the first of these allegations of the answer, I must decline to consider the rights of other than the defendants and those interested along the line of the proposed canal. The court cannot consider the rights of all appropriators of water from the Rio Grande below the terminus of the proposed canal. First—because they are not parties to the suit, and therefore not subject to the orders, nor bound by the decision of this court. Second—the testimony of Mr. Harroun as to the flow of the water shows that fully as much water flows in the river at San Marcial, far below Albuquerque, as flows at Albuquerque and above during most of the year, and sometimes much more, all of which tends to show that there are tributaries contributing waters to the lower part of the river that must be taken into account when the rights of appropriators below the proposed canal are determined. If the rights of appropriators below are affected by by the diversion of water through proposed canal, the courts are open for the protection of their rights. This case in-

> volves the right of eminent domain over the defendants' land, or of land-owners along the line of the canal, and as to that issue parties below the terminus of the ditch have no interest. The rights of parties to the use of water below the canal cannot be affected by this decision and will not be considered." (*Trans., pp. 59-60.*)

It is submitted that this is an adjudication that persons interested in the waters of the Rio Grande below the mouth of appellee's canal cannot be affected by the construction of the canal and involves the assumption that as much water will continue to flow in the natural channel of the river after the diversion proposed to be made by appellee is accomplished, as before. As lower riparian proprietors they had a right to be heard as to any diversion of waters made above them on the stream. The restraining order is broad enough to embrace these persons whose rights were refused consideration. But this conclusion is erroneous for another and much more serious reason, *i. e.*, it assumes that appellee may be invested with power to condemn lands for the right of way for its canal, even though it is without power to divert the waters of the Rio Grande through the canal when constructed. Appellants contend that appellee could not be invested by the territorial legislature with power to construct the canal which it proposes to construct, unless it was also invested with power to divert water through that canal; that the right of eminent domain attempted to be conferred by the act was in this sense an entire right and that the existence of the right to take

the initial step of examination and survey depends upon the existence of the right to do the ultimate act of diverting water through the canal when constructed, because the canal without water could not be a public utility but on the contrary would necessarily be a public nuisance.

Attention is invited to the fact that so far as disclosed by this record the owners of all of the land susceptible of irrigation by means of the canal of appellee are resisting its construction. So far as appears by this record there is not a foot of land susceptible of irrigation by means of appellee's proposed canal, which is not already sufficiently supplied with water through existing community ditches.

There are some expressions in the opinion of the court to the effect that there are seven thousand acres of irrigable land which the present ditches are unable to serve, but there is no finding by the court to that effect and it is settled that the opinion may not be looked to to eke out the findings of fact.

In its answer to the cross complaint (as well as in its reply to the answer of appellants) appellee set up:

IV.

> Plaintiff and cross-defendant denies that it is not the owner or occupier of any lands which can be irrigated with water conducted through its proposed canal or ditch, and denies that it is not the owner of any water right or of any water with

which it may conduct the business for which it was organized; and denies that it intends to solely and entirely rely upon such ownership of the waters of the Rio Grande as it can acquire by the construction and maintenance of its proposed canal or ditch, and its diversion of such waters by means thereof; but alleges that the owners of at least eight hundred and fifty acres of land now irrigated by water taken from said river and who have had the absolute right to take water from such river as appurtenant to said land, have entered into contracts with the promoters and organizers of the plaintiff company to take water for the irrigation of their lands from said company so soon as its said ditch shall be constructed. And plaintiff and cross-defendant further answering, alleges that it is the beneficial owner of said contracts and that the promoters with whom such contracts were made have agreed to assign and set over same to the plaintiff and cross-defendant whenever it demands the assignment of the same; and plaintiff and cross-defendant further alleges that many other persons, owners of lands now irrigated by water taken from said river, are ready and willing and offer to take water from said company out of said ditch when it is constructed, for the purpose of irrigating lands now being cultivated by them. And further answering, alleges that the said company was organized not for speculative purposes, but for the purpose of developing and conserving the water now going to waste through the channel of said river, and not for the purpose of gain and speculation; and denies that it will dispose of any water

> which may pass through its proposed canal or ditch to consumers to be used for any purpose they may see fit to apply the same; and on the contrary, alleges, that the objects and purposes of the corporation are for the purpose of irrigation and improvement and colonization of lands; and denies that it proposes to divert and appropriate water out of said river purely for speculation; and alleges that it is a public incorporation, incorporated for the purpose of supplying water and for the general use of such owners of irrigable lands as see fit to patronize it, and that such appropriation is under the law of beneficial use. (*Trans., p. 26*).

But the fourteenth, fifteenth and sixteenth findings of fact are to the contrary of these allegations.

Appellants do not ask the court to review the action of the supreme court of the Territory in so far as it is held that the Rio Grande is not one of the streams referred to in Section XXV of the act in question nor do they think that some other matters relied on by them in the answer, as to which the decision of the trial court was adverse upon the facts, are before this court for review, but they submit that the questions presented by this record are:

First: Is the act of the legislative assembly of the Territory of New Mexico, approved February 24th, 1887, a valid exercise of the legislative power granted by Congress to the legislative assembly of the Territory of New Mexico?

Second: If the said act is otherwise a valid

exercise of legislative power, is it not void because in conflict with the legislation of Congress on the same subject?

Third: Is not the act in question in conflict with the treaty commonly known as the "treaty of Guadalupe Hidalgo" and therefore void?

Fourth: Is not the act in question void because not a reasonable exercise of the legislative power granted by Congress to the Territorial legislature?

Fifth: Could the trial court properly exclude from consideration the rights of those persons who initiate their diversion of water from the Rio Grande below the mouth of appellee's proposed canal but who are associated with appellants in resisting the exercise by appellee of the power of eminent domain, and who are embraced in the very terms of the restraining order issued at the instance of appellee?

Appellants have filed the following assignment of errors:—

I.

The court erred in affirming the judgment of the district court of Santa Fe county because the facts found by the said district court are insufficient to support the said judgment.

II.

The court erred in affirming the conclusion of law of the said district court, as follows:

"That the plaintiff, by the filing of its

articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such right of eminent domain does not depend upon the ownership of lands by plaintiff prior to the construction of its canal by owners of lands to carry water for such owners."

III.

The court erred in refusing to hold that the act under which the appellee is incorporated as construed by the district court of Santa Fe county, is in contravention of the legislation of Congress on the same subject, especially the act of March 3d, 1877, entitled "An act to provide for the sale of desert lands in certain States and Territories," and the acts of Congress amendatory thereof.

IV.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants, at the time of filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated".

V.

The court erred in affirming the conclusion of law of the said district court as follows:

"That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff".

VI.

The court erred in affirming the conclusion of law of said district court as follows:

"That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Gudalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the treaty rights of defendants are immaterial."

VII.

The court erred in affirming the judgment of the district court of Santa Fe county refusing to grant to appellants the relief demanded in their cross-complaint.

In support of these assignments of error they submit the following:

POINTS AND AUTHORITIES.

I.

The act in question interferes with the primary disposal of the soil and is forbidden by the letter of the organic act.

The validity of this act as a whole must be tested by the validity of the grant contained in sub-sections 4, 5 and 6 of section 17 as follows:

"Corporations formed under this act * * shall have in addition to the powers hereinbefore mentioned, rights as follows: * * * * * * * * *

4. To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided: And provided, further, that no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same when so diverted.

5. To furnish water for the purposes mentioned in section one, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

6. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies."

This is clearly an attempt by the legislature to grant to corporations created under this act the right to take the unappropriated waters of all streams in the Territory of New Mexico and to sell the same for pecuniary profit, with the single limitation, that uniform prices shall be charged to each class of consumers.

Unless the Territorial legislature had power

to make this grant the whole purpose of the act is defeated and the act must be held void.

It is not conceivable that the Territorial legislature would have attempted to authorize the creation of corporations for the purposes declared by this act without some such provision as this. Indeed, it may safely be said that all other parts of the act are so connected with and dependent upon this that the legislature intended them to be effective as a whole and would not otherwise have passed the act in question. (*Pollock vs. Farmers Loan & Trust Co., 158 U. S., 636.*)

Upon what authority is it contended that the Territorial legislature could make such a grant? Certainly the waters thus attempted to be granted away are not the property of the Territory for it is a matter of which this court takes judicial notice that all waters and all lands within the territory ceded by the Republic of Mexico, not held in private ownership at the time of the cession, became the property of the United States. The court further takes judicial notice of the conditions existing in the arid region and that agriculture cannot be successfully carried on in the valley of the Rio Grande without irrigation. Also that the United States are the owners of lands in the valley of the Rio Grande which are subject to entry under the public land laws and that such lands, when irrigable, are of great value, but without irrigation are worthless.

All of these facts appear to be easily within the rule laid down by this court in the case of

United States vs. The Rio Grande Dam Co., 174 U. S., 695.

In *Lux vs. Haggin*, (*69 Calif., 255.*) a great and leading case on water rights in California, the supreme court of that state said:

> "Would not a state law which, in advance of the grant, should attempt to take from the grantee the flow of the stream, acquired from or sought to be conveyed by the United States, and confer the waters on one who has acquired no right to them from the United States, be an interference with the 'primary disposal' of the public lands?
>
> We do not find it necessary to say that the prospective provisions of the code would violate the obligation of a contract. But when the state is prohibited from interfering with the primary disposal of the public lands of the United States, there is included a prohibition of any attempt on the part of the state to preclude the United States from transferring to its grantees its full and complete title to the land granted, with all its incidents."
>
> "The same rule must apply to homesteaders, pre-emptioners, and other purchasers under the laws of the United States. To say that hereafter the purchaser from the United States shall not take any interest in water flowing to, or in the trees on, or the mines beneath, the surface,—but others of our citizens shall have privilege of removing all these things,—is to say that hereafter the United States shall not sell the water, wood, or ores." * * *pp. 372-3.*
>
> "The state has granted the waters

running to its own lands by authorizing the diversion of waters from its lands, and doubtless such grantees acquire the state property in the waters whenever the state has a property in the waters at the time of the grant." * * *p. 374.*

"The right to the use of the waters as part of the land once vested in its private guarantee, the state has no power to divest him of the rights, except on due compensation." * * *pp. 374-5.*

"The right of the prior occupant of the land or water on the public domain of the United States being recognized by the courts, it cannot be doubted that the legislature had power to establish or change a rule of evidence according to which the prior occupation is to be proved. With reference to appropriation of water on public lands, for example, the legislature had power to require that the notice of appropriation should contain certain statements, that work should be commenced within a definite time, and be completed within a named period, etc. *Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, nor to detract from the estates in such lands granted under the laws of the United States.* Nevertheless, whilst a body of land, the waters thereon shall remain a portion of the public lands of the United States, the right of mere possessors, or asserted possessors, will continue to be determined, as between themselves, by the law applicable to such controversies as the same was laid down by our courts previous to the code enactments, except so far as it may have been modified by the provisions of the code.

> The legislation of the state (with reference to occupations on the public lands), like the judicial decisions, is based on the presumption that the general government has permitted the occupation of water, or of land with the water thereon, as the case may be." pp. 377-8.

In an early case Mr. Justice Daniel, speaking for this court, (20 *How.*, 561) said:

> "The authority and effect of the Territorial laws of Minnesota upon subjects within the legitimate bounds or cognizance of that Territorial Government, no person, it is presumed, will be disposed to question; but it seems equally clear that to respect the rights and interests which come not within the scope of that authority, but which are created by the Constitution and Laws of the United States, imposes a duty as sacred as any which enjoins upon a State or Territory the obligation to protect and maintain whatever of power may justly belong to it. And it cannot without extravagance be supposed, that to secure these proper and necessary ends, the Territory should assume the power to control the acquisition or transmission of property never belonging to, and not acquired from, herself; to which, therefore, she could annex no conditions, much less conditions which might impair the interest of the citizens of every state, and of every state collectively in the Confederacy, and even of the United States, and render utterly worthless, and incapable of being disposed of, subjects of which the territory has no legal right or property whatever. It cannot be denied that all the lands in the Territories, not appropriated by competent

authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such title as the Government may deem most advantageous to the public fisc, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new states, and has heretofore been recognized and scrupulously respected by sovereign States within which large portions of the public lands have been comprised, and within which much of those lands is still remaining. Can this right co-exist with a power in a Territory (itself the property of the United States) to interpose and to dictate to the United States to whom, and in what mode, and by what title, the public lands shall be conveyed?" (*Irvine v. Marshall, et al. 20 How., 561.*)

The power of the Territorial legislature to make this grant is utterly inconsistent with the right of the United States to control and dispose of their own property wheresoever the same may be situated, which is established by many decisions.

Gibson v. Chouteau, 13 Wall., 92.
Van Brocklin v. Tennessee, 117 U. S., 151.
Van Sickle v. Haines, 7 Nev., 262.
Thorpe v. Freed, 1 Montana, 680.
Paige v. Peters, 70 Wis., 178.

II.

The act in question is in direct conflict with the legislation of Congress on the same subject.

The courts below found as matter of law:

> That the plaintiff, by the filing of its articles of incorporation with the secretary of the Territory of New Mexico and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canal and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry water for such owners. (*Trans., p. 36*).

The proviso to the act of March 3, 1877, commonly known as the desert land act, is as follows:

> "Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon *bona fide* prior appropria-

tion, and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." (*1st Supp. Rev. Stats.*, *137*).

Can it be said that water, to which appellee has acquired the rights set forth in this conclusion of law, yet remains "free for the appropriation and use of the public for irrigating, mining and manufacturing purposes?"

The legislation of Congress which is set out in the statement of the case and need not be repeated here, shows that the established policy of the Government has always been to leave the public water supply open to appropriation by settlers upon the public domain, and by miners and others engaged in the development of the mineral and other resources of the country, and evinces a settled purpose not to permit such water supply to be monopolized or to become the subject of speculation and traffic for pecuniary profit. The first legislation of Congress on this subject, which is compiled in *Sections 2339* and *2340 of the Revised Statutes*, was declared by this court to be rather a recogni-

tion of existing rights than the creation of new rights. (*Jennison v. Kirk*, 98 *U. S.*, 453).

It is true that Congress thus recognized the right of prior appropriation of waters of running streams upon the public domain, but it is also true that with the recognition goes a limitation upon the right, which is of universal application, and that is, that no person may lawfully divert from any such stream more water than is actually applied to a beneficial use. Appellants' contention is not that any number of cultivators of the soil may not unite their efforts and make, by themselves, or by their duly constituted agent, a joint diversion and an individual appropriation, of the waters diverted so as to acquire a perfect right to the use of such waters, but their contention is that the right to the use of water for purposes of irrigation is incident to the ownership or occupation of lands, without which it does not exist.

This principal runs through all of the decisions of this court upon this subject.

> "The right to water by prior appropriation, thus recognized and established as the law of miners of the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion to run waste and prevent others from using it for mining or other legitimate pur-

poses; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

Such was the report of the ruling of the Supreme Court of California in Butte Canal and Ditch Company vs. Vaughn, where it was held that the first appropriator had only right to insist that the water should be subject to his use and enjoyment to the extent of his original appropriation and that its quality should not be impaired so as to defeat the purpose of that appropriation. To this extent, said the court, his rights go and no farther; and that in subordination to them subsequent appropriators may use the channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose; that whilst enjoying his original rights the first appropriator had no cause of complaint. In the subsequent case of Ortman vs. Dixon, the same court held to the same purport, that the measure of the right of the first appropriator of the water as to extent follows the nature of the appropriation or the uses for which it is taken." (*Atchison vs. Peterson, 20 Wall., 514.*)

"Ever since that decision (*Tartar vs. Spring Creek Water and Mining Company, 5 Calif., 397*) it has been held generally throughout the Pacific States and Territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour mills and saw mills and to irrigate land for cultivation, as well as to enable miners to work their mining

> claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." (*Basey vs. Gallagher, 20 Wall., 683.*)

Other cases cited at the foot of this proposition are in entire harmony with the contention of appellants that this is and has been the settled policy of the Government from the beginning. If, under acts of Territorial legislatures, corporations may be formed to monopolize the water supply of the arid region and the mere filing of articles of incorporation under such acts confers authority to take and divert the unappropriated waters of the public streams, the will of Congress is necessarily thereby defeated. Water, for the use of which, tribute must be paid to a private corporation, cannot be said to be free and subject to appropriation by the public. Appropriation, in the sense of the act of Congress, has a well defined meaning. This is recognized by the opinion of the court below in which it is said:

> "To constitute a valid, prior appropriation of the water of the Rio Grande, two things must be shown. First, there must be a rightful diversion. Second, an appli-

cation to some beneficial use, and neither of these is sufficient without the other."

(*Trans., p. 51*).

However, the opinion proceeds:

"It is not essential that the water shall be used by the person or corporation diverting the water from the stream, for law is well settled that water may be diverted from the streams by canals and ditches owned by individuals or corporations, and conducted long distances and beneficially used by others. This is fully established by the large canal and ditch systems existing in California, Colorado, Arizona and many other states. In such cases the beneficial user is held to have constituted the ditch or canal company his agent, to divert and conduct water for his use, and the Latin maxim, *qui facit per alium, facit per se*, seems to apply in such cases.

I see no reason, therefore, why such reservoir, canal and ditch companies as are authorized by the laws of the Territory should not be allowed to perform services in connection with the irrigation of lands in this Territory similar to those performed by such corporations in other states and territories where the same law, as to water rights, prevails. I can see no legal reason for preventing them from exercising the power conferred upon such companies by the statute, provided there is surplus water subject to appropriation through the agency of such company."

(*Trans., p. 51*).

In view of the facts that the courts below have found that there is no evidence that appellee relies on any source of water supply other

than the Rio Grande or that its canal is expected or intended to receive and distribute stored waters and that the appellee is not the owner of any lands and has no contract with or employment by any person who is the owner of lands irrigable from its proposed canal for the conduct of waters upon such lands and that there is no evidence that any owner of lands not now irrigated from existing acequias desires or intends to irrigate such lands from the proposed canal when completed, it seems a little difficult to understand the application, to the case at bar, of the maxim relied on in this quotation. The attempt to apply the maxim seems to appellants almost, if not entirely, to concede their position.

In the case of *Millheiser v. Long*, (*61 Pac. Rep., 111.*) which was decided by the supreme court of New Mexico on the same day on which the case at bar was decided, the doctrine contended for by appellants was recognized and applied as between natural persons as appears from the syllabus of the case prepared by the court, as follows:

> "1. Capacity of ditch alone does not constitute a valid appropriation of water, unaccompanied by application of the water to some beneficial use.
>
> 2. Where two ditches are receiving water from the same stream, one constructed in 1885, and the second in 1888,—the owners of water rights in the first at the time the second is constructed have a prior appropriation of so much water as has been actually applied by them to some beneficial purpose; but sales of water rights by them, for the use of water to be conducted

through the first ditch in excess of valid appropriation by the owner of water rights in the first ditch, after water has been diverted and beneficially applied through the second ditch, is void as to such excess, as against the rights of valid appropriators through the second ditch.

3. Where the controversy involves the prior appropriation of water between those claiming water rights in two ditches constructed at different times, proof which fails to show what tract or tracts of land water was conducted upon, how much of the land, for what years, and what portion each year, is not sufficiently specific to base a decree upon as to the prior appropriation of the water, where numerous tracts of land and ten years' time, are involved."

It is true that in the case referred to no rights were claimed by either party under the act of 1887, which is called in question in this case. Certain it is, however, that the court held in the Millheiser case, in effect, that, the diversion of water in excess of the amount actually applied to a beneficial use was unlawful *ab initio* and that water so diverted could not be sold so as to vest any right in the purchaser; which seems to be entirely irreconcilable with the holding in the case at bar. It does not meet this criticism to say that in the Millheiser case there was a subsequent valid appropriation through the second ditch and that the contest there was one of priority between appropriators who were in good faith attempting to acquire a right to the use of the water, because, if the proposed diversion by appellee, is held in this case

lawful when accomplished, it must follow logically that the only right to the use of this water which can be acquired by any one must be acquired under appellants.

The decisions of the supreme court of Colorado are much relied on by the courts below and counsel for appellee to support the decision in this case, while appellants and their counsel insist that the decisions of that court are in accord with their contention.

The constitution of the State of Colorado contains this provision:

> "Sec. 5. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public; and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.
>
> Sec. 6. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall be given the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.
>
> Sec. 7. All persons and corporations shall have the right of way across public, private and corporate lands, for the construction of ditches, canals, and flumes

for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Sec. 8. The general assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations." (*Constitution of 1876, Article XVI*).

The legislation enacted to carry into effect these constitutional provisions distinctly authorizes the creation of corporations for the purpose of carrying the public waters to consumers.

"*Sec. 308.* Whenever any three or more persons associate, under the provisions of this act, to form a company for the purpose of constructing a ditch for the purpose of conveying water to any mines, mills or lands, to be used for mining, milling or irrigating of lands, they shall, in their certificate, in addition to the matters required in section two (2) of this act, specify as follows: "The stream or streams from which the water is to be taken; the point or place on said stream at or near which the water is to be taken out; the line of said ditch, as near as may be, and the use to which the said water is intended to be applied." *Rev. Stats. Colo., 1883, Sec. 308.*)

At the time of the compilation of 1883, the State of Colorado was divided into ten irri-

gation districts and in each district there was a water commissioner appointed by the governor whose duty, among other things, was as follows:

> "*Sec. 1754.* It shall be the duty of the said water commissioners to divide the water in the natural stream or streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant, sheriff or constable of the county in which the head of such ditch is situated, the head gates of any ditch or ditches heading in any of the natural streams of the district, which, in a time of scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream." (*Rev. Stats. Colo., 1883, Sec. 1754.*)

Elaborate provision is made to enable the water commissioner to enforce the powers conferred upon him by the statute. Priority of appropriation is established by the provisions of *Sec. 1763.*

> "Sec. 1763. In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association, or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the first day of June, A. D. 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the

proper court, and in the matter of priorities of water rights in district number——, as the case may be, which statement shall contain the name or names, together with the post-office address of the claimant or claimants claiming ownership, as aforesaid, of any such ditch, the owner or owners shall choose and adopt a name, to be therein stated, by which such ditch, canal or reservoir shall thereafter be known, the description of such ditch, canal or reservoir as to location of headgate, general course of ditch, the name of the natural stream from which such ditch, canal or reservoir draws its supply of water, the length, width, depth and grade thereof, as near as may be, the time, fixing a day, month and year as the date of the appropriation of water by original construction, also by any enlargement or extension, if any such thereof may have been made, and the amount of water claimed by or under such construction, enlargement or extension, and the present capacity of the ditch canal or feeder and *also the number of acres of land lying under and being or proposed to be irrigated by water from such ditch, canal or reservoir.* Said statement shall be signed by the proper party or parties." (*Rev. Stats. Colo., 1883, Sec. 1763.*)

The essential difference between the provisions of the constitution and statutes of Colorado and the legislation of Congress is found in the fact that the constitution and statutes of Colorado sanction the business of transporting water for hire from natural streams to distant consumers, authorize the creation of quasi public corporations for

that purpose, while the legislation of Congress requires that,

> "All surplus waters over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."

In the light of this distinction appellants submit this quotation from a leading Colorado case:

> "Does the record show a clear legal right of relator, from the enjoyment of which he is unlawfully precluded by respondent? Our constitution dedicates all unappropriated water in the natural streams of the state "to the use of the people," the ownership thereof being vested in the "public." The same instrument guarantees in the strongest terms the right of diversion and appropriation for beneficial uses. With certain qualifications, it recognizes and protects a prior right of user, acquired through priority of appropriation. We shall presently see that, after appropriation, the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator. But, to constitute a legal appropriation, the water must be applied within a reasonable time to some beneficial use; that is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer, though the pri-

ority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch. The *constitution unquestionably contemplates and sanctions the business of transporting water, for hire,* from natural streams to distant consumers. The Colorado doctrines of ownership and appropriations (as declared in the constitution, statutes and decisions) necessarily give the carrier of water an exceptional status; a status differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary, now, however, to enumerate these rights in detail; for the present, *it suffices to say that they are dependent for their birth and continued existence upon the use made by the consumer.*"

Wheeler v. Northern Colo. Irr. Co., 17 Pac., 489-90.

If appellee's contention is sustained, appellants may not enlarge their ditches or increase the area of their cultivated lands, because to do so will require an additional water supply, which cannot be obtained without invading rights established by the decree in this case to be in appellee. Neither can a settler upon the public domain divert the waters of the Rio Grande for the purpose of reclaiming and acquiring title to desert land, under the public land laws, except subject to the rights of appellee, as determined by this decision.

Appellants insist that such a result cannot be supported upon principle or authority.

Starr v. Beck, 133 U. S., 541.

Turner v. Colo., 49 Pac., 971.
Combs v. Agricultural Ditch Co., 28 Pac., 966.
Creek v. Bozeman Water Works Co., 38 Pac., 459.
Senior v. Anderson, 115 Cal., 496.
Smith v. Hawkins, 110 Cal., 122.
Simpson v. Williams, 4 Pac., 1213.
Barrows v. Fox, 98 Cal., 63.
Faulkner v. Rondoni, 104 Cal., 140.
Farmers' Canal Co. v. Southworth, 21 Pac., 1028.
Rominger v. Squires, 12 Pac., 213.
Schilling v. Rominger, 4 Colo., 104.
Becker v. Marble Creek Irr. Co., 49 Pac., 893.
St. Louis Water Co. v. Estrada, 48 Pac., 1076.
Tyler v. Wilkerson, 24 Fed. Cases, page 472, Case No. 14312.
Regnew v. Tacoma Light & Water Co., 38 Pac., 147.

III.

The act in question is in conflict with the treaty of Guadalupe Hidalgo and therefore void.

Appellants by paragraph ten of their answer set up and claim a vested right to divert the entire flow of the waters of the Rio Grande acquired by their ancestors, grantors and predecessors in title prior to the acquisition of the Territory of New Mexice by the United States and allege that these rights are protected and guaranteed by the terms of the treaty commonly known as the treaty of Guadalupe Hidalgo and are not subject to be defeated or impaired by any law of the Territory

of New Mexico. As to this claim the courts below said:

> "That the defendant cannot lawfully set up in this action any rights secured to them and other associates of their predecessors in title by the treaty of Guadalupe Hidalgo and that the allegations of paragraph ten of the answer of defendants with reference to the the treaty rights of defendants are immaterial."
>
> (*Trans., pp. 15-16.*)

This was equivalent to striking out paragraph ten of the answer and entitles appellants to have the allegations of this paragraph of the answer, taken as true, on this review, or, at least, to have the ruling treated as if the courts below had rejected offers, made at the trial, to prove the allegations contained in that paragraph. (*Budzisz vs. Illinois Steel Co., 170 U. S., 43.*)

Unless it can be said that there is no fact properly pleaded in paragraph ten of the answer, it must be conceded that appellants are entitled to the deliberate judgment of the court below, as to the legal effect of such facts, which, as affirmatively appears from the record, they have not had; the courts below having simply refused to give any consideration whatever to those facts. This action of the courts below, as is apparent from the opinion sent up with the transcript, was based upon a misunderstanding of appellants, contention.

Those courts said:

> "Upon the allegation of defendants as to treaty rights, I am of the opinion that the lands of citizens of New Mexico, since

> the cession, are subject to the operation of the law of eminent domain under the laws of the United States and the states and territories thereof, and not exempt therefrom by virtue of the treaty of Gaudalupe Hidalgo. The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights and adjusted the system to the different sections of the country as necessity required, and the laws of the states and territories are in harmony therewith. Those laws must govern wherein they differ from the treaty provisions, and wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the states and territories are ample for the protection of the rights of appropriators of water in this territory, and remedies for impairment or destruction of such rights are adequate also."
>
> (*Trans., p. 60.*)

Appellants do not claim any exemption from the operation of Territorial laws conferring the right of eminent domain, because of anything contained in the treaty of Guadalupe Hidalgo. They claimed and now insist that in case of a conflict between a law of the Territory of New Mexico and a treaty stipulation of the United States made in pursuance of law, the treaty is of paramount authority and must prevail. This court has, in numerous cases, established this doctrine.

> "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the govern-

ments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." (*Head Money Cases, 112, U. S., 958.*)

In *Hauenstein v. Lynham*, (*100 U. S., 488*), this

court quotes with approval the following extract from the opinion in the case of *Ware v. Hylton*, (*3 Dal., 199*):

> "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State legislature, this certain consequence follows,—that the will of a small part of the United States may control or defeat the will of the whole."

In a very late case, where this court had under consideration the very treaty stipulations relied on by appellants, it is said:

> "Undoubtedly, by the rules of international law and in accordance with the provisions of the treaty between the Mexican Government and this country, the United States are bound to respect the rights of private property in the ceded territory." (*Barker v. Harvey, 181 U. S., 486*).

Appellants submit that the allegations of paragraph ten of the answer are well pleaded. It is true that some of those allegations relate to the

existence and effect of Spanish and Mexican laws, and that this court takes judicial notice of those laws. (*United States vs. Chavez, 159 U. S., 452*). It is also true, that it was incumbent upon appellants, under elementary rules of pleading, to plead those laws, in order to bring them to the attention of the court, if they were relied upon, as the basis of any right, involved in the litigation.

The fact that this court takes judicial notice of such laws does not change the rule of pleading but probably subjects the pleading to examination for the purpose of determining whether or not those laws are as alleged, and appellants submit that their allegations as to those laws, are well supported by authority.

In the very recent case of *Whitney vs. United States*, (*181 U. S., 108*), this court said:

> "In reviewing questions arising out of Mexican laws relating to land titles we recognize what an exceedingly difficult matter it is to determine with anything like certainty what laws were in force in Mexico at any particular time prior to the occupation of the country by the American forces in 1846-1848. This difficulty exists because of the frequent political changes which took place in that country from the time the Spanish rule was first thrown off down to the American occupation. Revolutions and counter-revolutions, empires and republics, followed each other with great rapidity and in bewildering confusion, and emperors, presidents, generals and dictators, each for a short period, played the foremost part in a country where revolution seems during that

> time to have been the natural order of things. Among the first acts of each government was generally one repealing and nullifying all those for its predecessors."

While the changes mentioned by the court have been the occasion of much difficulty in determining the validity of grants, it is believed that the law of water rights remains the one stable and unchanging thing throughout the vicissitudes of that government and that at the time of the treaty of cession the laws relating to waters and water rights remained substantially unchanged from the time of the earliest occupation of the country of which we have record.

It is not deemed necessary to discuss at this time in great detail the nature and extent of those water rights because it is believed that the exigencies of this case require no more than a demonstration that they were substantially as set up in paragraph ten of the answer. Perhaps the supreme court of the State of California, more often than any other tribunal, has been confronted with questions of this character and certainly that court displays a wealth of learning in dealing with them.

While we have no reported cases in California at all analogous to the case at bar, the reasoning and comments of the supreme court of that state upon questions of Spanish and Mexican law are believed to be of the greatest value. Therefore we submit the following extensive quotations:

From Lux vs. Haggin, (69 Calif., 255):

> "The common use of the water, it would seem, existed only while they con-

tinued to flow in and constituted a portion of the river. But under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals." (*p. 317*).

"Those who appropriated and diverted the waters of an innavigable river in accordance with the laws obstructed *pro tanto* its common use. Nevertheless, they acquired an exclusive right to the use of that which they diverted, because, if they complied with the established conditions, their rights were acquired under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use. No one of such had any right in or to the water until he had complied with the conditions which authorized him to appropriate it. Every one of such who complied with the conditions, and appropriated water, acquired a vested right in such water, at least while he continued to use it, except in the single case where he acquired a right merely conditional, under laws which reserved the power in the agents of the state or municipality to deprive him of it without indemnification. It may be conceded that one who had acquired a right to the exclusive use of a portion of the waters of a river under the Mexican regime could not be deprived of his right by a law of California. * *

Those who had not appropriated waters in the mode prescribed had no right or property in the water or its use, of which they would be deprived by subsequent legislation conferring the use of the waters on riparian proprietors alone. And it would seem very clear that those

who actually appropriated water, in compliance with the conditions prescribed, acquired a proprietary interest of which they could not be deprived—at least while they continued its use—except on sufficient indemnification. It cannot be presumed that, under a constitution which declares, in as distinct terms as does our own, that private property shall not be taken, except on due compensation, the legislature attempted to authorize an arbitrary deprivation of property rights acquired by expenditures invited by the laws themselves." (*pp. 322-3*).

"Thus the property of the nation is in the river and its bed, while it is the bed of the river; the common use continues while the water is the water of a river. But a private right to the exclusive use of the waters could be acquired under the Mexican law by prescription, or on compliance with the established conditions; and the general property of the nation in running waters did not prejudice such special private rights." (*p. 324*).

"The laws of Mexico relating to pueblos conferred on the town authorities the power of distributing, to the common lands and to its inhabitants, the waters of an innavigable river on which the pueblo was situated. It is not necessary to say that the property of the nation in the river, as such, was transferred to the pueblo, but it would seem that a species of right to the use of all its waters necessary to supply the domestic wants of the publadores, the irrigable lands and the mills and manufactories within the general limits, was vested in the pueblo authorities, sub-

ject to the trust of distributing them for the benefit of the settlers.

A translation of the plan of Pitic is annexed to Dwinnelle's Colonial History of San Francisco. (Addendum, No. 7). The original is not before us. Whether the plan of Pitic is or is not a scheme in all respects applicable to every pueblo created after the date, November 14, 1789, (as is claimed by counsel), it may be conceded the provisions therein contained were, in susbtance, those having force in the pueblos established in California while it was part of the territory of Mexico. (*p. 326.*)

"The plan authorized a commission, after the measurement of the exterior lines of the four leagues to set apart the *ejidos*, *popris*, etc., and to distribute the remaining lands to the settlers in separate tracts.

The nineteenth and twentieth sections of the plan read:

"Nineteenth—the advantage of irrigation being the principal means of fertilizing the lands, and the most conducive to the increase of the settlement, the commissioner, shall take particular care to distribute the waters so that all the land that may be irrigable might partake of them, especially at the seasons of spring and summer when they are most necessary to the cultivated land in order to insure the crops, for which purpose, availing himself of skillful or intelligent persons, he shall divide the territory into district (partidos) or hereditaments, marking out to each one a trench or ditch, starting from the main source, with the quantity of water which might be regu-

lated as sufficient for its irrigation, at the said periods and at the other seasons of the year that they may need them, by which means each settler shall know the trench or ditch by which his hereditament shall be irrigated; and that he cannot and shall not have the power to take the water of another, nor in a greater quantity than that which may fall to his share, for which purpose and that it may not increase in injury to the owners situated on the land beyond or still lower, it shall be proper for the trenches or partitions to be constructed in the main ditch made of lime and stone at the cost of the settlers themselves.

"Twentieth—In order that these (the settlers) might enjoy with equity and justice the benefit of the waters in proportion to the need of their respective crops, there shall be named annually by the ayuntamiento one alcalde (or mandador) for each trench, to whose charge shall fall the care of distributing them in the estate (heredades) comprised in the 'partido' or hereditament, which shall be irrigated by them in proportion to their need for this benefit, designating by a list which he shall make out the hours and day and night at which each owner (heredado) shall irrigate his lands sown with grain; and in order that by the carelessness or indolence of the owners (duenos), those (the lands) that may need them shall not remain without irrigation, nor the crops be lost, whereby independent of the private injury may also result that of the public and community, produced by the want of provisions and supplies, it shall also come within the duty of the alcalde, or mandador, for each trench to have a servant (peon) or day

laborer, knowing the hour of the day or night designated for the irrigation of each tract of land or cornfield, who, in default of its owner, shall take care to irrigate it; the just price of his labor, which shall be caused to be paid to him by the owner of the land or estate (heredad) irrigated to be thereafter regulated by the commissioner or by the justice." (*pp. 326-7-8*).

The same court in *Vernon Irrigation Co., vs Los Angeles*, (*106 Cal., 247*), said:

"Now the waters of all rivers were, under the Spanish and Mexican rule, public property, to be administered and distributed for the use of the inhabitants. Apparently this was sometimes done by the Pueblo authorities outside of the Pueblo lands. It must be remembered that towns and villages were greatly favored under the Mexican system; that to establish them was the mode adopted for the settlement of the country. Contractors (capitulantes) were rewarded for organizing them. The ordinances of the king of Spain and the provisions of the government of Mexico in regard to them direct that they be located where water will be convenient. The organization of the pueblo of Los Angeles itself—to be hereafter referred to—will show the solicitude of the government in regard to this matter. Since the water belonged to the nation and could not be acquired from it by condemnation, it would seem to follow, as a matter of necessity, that, when the pueblo was organized under the laws, a sufficiency of this water for the pueblo was appropriated to it. The country was arid. The population was at first

almost wholly agricultural, and, we have seen, the waters were held by the pueblo, subject to the duty of distributing the same in the public interest.

"Nor do I think this was a mere political power which could be revoked at any time, so as to deprive the settlers, who had been induced to become inhabitants of the pueblo, of it. They had the same kind of right with reference to it which they had to the lands. Both were held as communal property, for the benefit of the inhabitants, and as an inducement to attract settlers.

"This view was adopted by this court in *Lux. V. Haggin, 69 Cal., 255.* The question there was whether, under Mexican or Spanish law, the water of rivers was dedicated to the public in such sense that the people could not be deprived of the common use. It was said that pueblos acquired a species of property in the water of streams within their boundaries—a right which was inconsistent with such supposed dedication. They had title to such waters, subject to the public trust of continuously distributing the same in just proportion. After citing authorities in support of the position the court proceeds: 'From the foregoing it appears that the riparian proprietor could not appropriate water in such manner as would interfere with the common use or destiny which a pueblo on a stream should have given to the waters, and semble that the pueplos had a preference or prior right to some of the waters, even as against the upper riparian proprietor.' The common use, here spoken of, is the use for the benefit of the com-

munity or the inhabitants of the pueblo.

"This view, I think, finds support in the history of the pueblo of Los Angeles. In 1779 it was determined to found a pueblo called Reyna de Los Angeles, settling it with soldiers and families told off from the garrisons; and the location was selected with a view to land and water for cultivation. In 1781 Don Phillipe de Neve, Governor, issued a decree providing for the founding of the pueblo in the immediate vicinity of the river Porconcula; all the land capable of irrigation should be carefully examined, and a point selected for the erection of a dam, which would insure the distribution of the water to greater portion of the lands, and the site of the town should be as near the river as possible.

"When we remember that these pioneers were really farmers or stockraisers, and the irrigation was a necessity, this order with the instructions is very significant.

"There is also an order made by Don Pedro Fages, governor of the peninsula of California, August 14, 1786, for the distribution of lands to the settlers at Los Angeles. It commissions the Ensign Don Jose Arguello to proceed to Los Angeles and give formal possession, directing him to clearly define what are public domains, viz., water, pasture, wood, etc.

"Arguello reported his compliance September 5, 1786, showing that he had confirmed to each settler his lot, and had measured the lands still unassigned and reserved to the crown, assigning them for the common use of the settlers for pastures,

for keeping stock, with a common right in all the waters, wood and timber.

"It also appears that in 1810 complaints were made to the commandante that the priests of San Fernando had diverted the water on the Cahuenga ranch, to the injury of the pueblo. The controversy was settled, the priests acknowledged the superior right of the pueblo.

"Counsel have furnished me with translations of numerous ordinances, laws, rules and regulations of Spain and Mexico relating to this subject. After perusing them I am satisfied with the conclusion reached in *Lux v. Haggin*, *supra*, that pueblos had a right to the water which had been appropriated to the use of the inhabitants, similar to that which it had in the pueblo lands, and that the right of its successor, the city, to the water, for its inhabitants and for municipal purposes, is superior to the rights of plaintiff as a riparian owner.

"The question recurs, has the city a right to take from the river more water than it requires for those purposes that it may sell such water to those outside the city limits? I think, this question must be answered in the negative. It was so determined in *Felix v. City of Los Angeles*, *58 Cal.*, *73*, although it was also said in that case that the city had a right to all the waters of the river if it required for municipal purposes or for the use of the inhabitants.

"I quote: 'It was conceded on the argument that the city had appropriated a portion of the waters of the Los Angeles river before the plaintiff constructed its ditches, and that the use by the city to the extent of such appropriation could not be

interfered with by any subsequent appropriation; but it was contended that the rights of the city were limited to the amount aporopriated at the time plaintiffs or their grantors built their ditch. Such a construction of the defendants' rights would not be in harmony with the facts found by the court. From the very foundation of the pueblo, in 1781, the right to all the waters of the river was claimed by the pueblo, and that right was recognized by all the owners of land on the stream, from its source, and under a recognition and acknowledgment of such right plaintiff's grantors dug their ditch. * * * * The city, under various acts of the legislature, has succeeded to all the rights of the former pueblo. * * * * From the fifth finding it appears that when the acts complained of were done by the officers and agents of the defendants, all of the waters of the Los Angeles river were required and were not sufficient to supply the wants of the city, and we are of the opinion that it was the right of the municipal authorities to prevent any diversion of said waters at the time by the plaintiffs.'

"'We do not intend to be understood as holding, nor do we hold, that the city, has the right at any time to dispose of the waters for use upon land situated without the city limits. On the contrary, we are of the opinion that the city has not that right.'"

Hall's Mexican Law, 411.
Escriche, Vol. 1, *p.* 79, "*Acequia.*"
Same, p. 134, *S. IV*, "*Agua.*"

IV.

The act in question is void because it is not a reasonable exercise of legislative power.

This court takes judicial notice of the fact that New Mexico is in the arid region where agriculture is impossible except my means of irrigation; also that in portions of the Territory a system of irrigation has been in existence for centuries and that by this system entire communities owning agricultural lands, have been accustomed to join together for the purpose of excavating ditches, called *acequias*, to facilitate the irrigation of their lands, and that the practice of making in this manner joint diversion and individual appropriations of water for purposes of irrigation, prevails in all of the thickly populated portions of the Territory and especially including the valley of the Rio Grande. The court also takes judicial notice of the fact that in the unsettled and undeveloped portions of the Territory, particularly in the mountainous regions, water may be impounded by means of dams and reservoirs and lands, otherwise valueless, may be thereby reclaimed and made enormously productive. It is a matter of common knowledge that the acreage of lands of the latter class are counted by millions, that they are practically all, yet a part of the public domain and that the field for reclamation of lands of this character in the territory is inexhaustible, while the public

lands in some parts of the Territory are comparatively of very limited extent.

From these conditions, considered in connection with the topography of the country and the necessities of the people in the more densely populated portions, it is quite obviouse that a statute such as the one in question, although well calculated to meet the conditions existing in the unsettled and undeveloped portions of the Territory, must operate most unjustly and oppressively, in the settled and developed portions.

Notwithstanding these widely differing conditions, the legislature has attempted to authorize any five or more persons, who may file in the office of the Secretary of the Territory, articles of incorporation, as required by the act, to go into any part of the Territory, settled or unsettled, and to construct canals without regard to the existing local conditions and whether or not the particular section invaded is already sufficiently supplied with canals and irrigating facilities. There is no restriction as to locality; no limitation as to the size of canals; no requirement that the persons forming corporations under the act shall be owners or cultivators of land or identified with such owners or cultivators by any contractural or other relation or that any public necessity for the construction of the canal shall be shown to exist, nor even that there shall be a showing or finding by any tribunal or public body or tribunal representing the people, that the canal, when constructed, can be or will be utilized for the irrigation of lands. Neither is

there any limitation as to the number of canals that may be constructed in the same locality, nor any provision for the protection of the people against the oppressive and unnecessary exercise of the power of eminent domain attempted to be conferred. The only limitation on prices to be charged for water is that the rates shall be prescribed by laws of the Company and shall be uniform to each class of consumers. The extent to which lands may be condemned, under the power attempted to be conferred, is not limited by the express terms of the statute, and if the decision of the courts below is sound, such corporations are as unlimited as to the quantity of land to be condemned as they are with reference to the size of the canals to be constructed. The right of condemnation is found in subdivision six of Section 17, as follows:

> "6. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies."

One purpose for which such companies are authorized to be formed being the "colonization and the improvements of lands," this language would at least give color to the contention, that the legislature has attempted to authorize the condemnation of lands for "purposes of colonization and improvement," but so far no attempt has been made by appellee to condemn the lands of the appellants and their associates, who continue to irrigate and cultivate them "in accordance with

methods that were in vogue a hundred years ago," in order to colonize them with a more progressive class of farmers: and appellants are not apprehensive of any such attempt, at least in the immediate future.

Since conditions in Colorado are so much relied on by counsel and by the courts below to support the judgment in this case, it is deemed not inappropriate to ask at the hands of the court a comparison of the act in question with the legislation of Colorado, under which the splendid agricultural development of that commonwealth has been accomplished. A single provision of the statutes of Colorado will sharply emphasize the point appellants are now attempting to make.

Sec. 1716 of the *General Statutes of Colorado of 1883*, (the only compilation of the laws of the state within the reach of the writer,) provides:

> "1716. That no tract or parcel of improved or occupied land in this State shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch."

Under the statute of which appellants complain there is no limit to the number of canals which may be constructed so long as the construction of canals offer the promise of profitable investment for capital. The limitations which the legislature

of Colorado has placed upon the rights granted to corporations formed for the construction of irrigation canals are in striking contrast to those prescribed by this act, especially the method of fixing the rates to be charged to consumers of water, the method of ascertaining and having judicially determined all questions of priority of appropriation and the method of supervision by public officials, of the business of the canal companies, as well as what such a company is required to allege and prove in order to obtain the judgment of a court establishing the amount and date of its appropriation of water. If these regulations were reasonable and necessary to protect the consumers of water, against the abuse of privileges conferred upon such corporations in Colorado, is it not an unreasonable exercise of legislative power to leave the people of New Mexico at the mercy of this class of corporations as to these matters. Is it not so unreasonable and improvident that the courts may, with propriety, say that such legislation is not a rightful subject of legislation and is therefore void? Appellants are aware that the existence of such power as is here contended for is vigorously denied by the supreme court of New Mexico, but submit that the doctrine is not only logically sound in principle but has received the distinct sanction of this court. The case at bar furnishes an apt illustration of the practical results which are to follow if this legislation is sustained. On the one side we have a corporation composed, according to the articles filed with the secretary of the terri-

tory, of seven individuals. In their corporate capacity they own no lands neither have they any contracts with the owners or cultivators of any lands to carry water for them, neither do they show that there are any lands which can be irrigated from their proposed canal when constructed, but for reasons of philanthropy, or of prospective profit, they have determined to construct a canal thirty-five miles long, with a carrying capacity of 210 cubic feet of water per second, notwithstanding the opposition of thousands of people who own and cultivate the soil of the valley of the Rio Grande. I say "notwithstanding the opposition of thousands" advisedly for the answer alleges that the appellants and those associated with them in resisting the construction of this canal number many thousands of people, and, while the courts below denied to appellants the right to represent all of their associates in the litigation, it is nowhere denied that the number of people actively opposing the construction of this canal was numerically as great as alleged in the answer. Appellants submit that the courts are not without power to protect the people against this class of legislative improvidence and that the doctrine first distinctly applied to territorial legislation by the supreme court of Utah, is a salutary doctrine and is not an assumption of legislative functions by the judicial department nor an encroachment by the courts upon legitimate legislative powers.

In People vs. Daniels, *6 Utah, 288, 292, 296*, the Supreme Court had under consideration certain

taxes imposed upon Daniels by a municipal corporation named Moroni City, the seventh section of whose character was identical with that of Kaysville, and the question in respect to the legality of the taxation the same as in the case at bar. The Supreme Court of Utah held that the taxation in question could not be sustained, and, among other things, said:

> "In the organic act Congress, under restrictions, express or implied, confers upon the territorial legislature, authority to legislate with respect to such subjects as concern the people of the Territory. When the authority with respect to the subject is specific, and its extent is clearly defined, the discretion of the legislature within constitutional limitations cannot be questioned; the denial of such discretion would be a denial of the power of Congress; but when the power is given in general terms, and the extent to which it may be exercised upon the subject is not expressly limited and clearly defined in the organic act, then the territorial legislature must exercise its discretion. So far as that discretion is expressly limited by the Constitution or the organic act such limitation must be observed; but when it is not, the legislature must follow the dictates of reason and justice. The law must be reasonable and just, because the court will not presume that Congress intended to authorize the legislature to make an unjust, an unreasonable, an unequal or an oppressive law. The subjects to which the power of the territorial legislature extends are not specifically described, and their number is limited by the word 'rightful'. A law upon a subject act of that number

would be held void. In the case the court would determine that the subject within the power of the legislature; and to the extent to which the legislature may act on a rightful subject, when the limit is not expressly fixed, the court must ascertain the limit and determine whether the law is within it. * * * Municipal charters, boundaries of cities and villages, and municipal taxation, are rightful subjects of legislation, but the extent of the legislative discretion with respect to those subjects is not expressly limited; there must be a reasonable limit, however, to that discretion." The court applied to the provisions of the organic act in question, conferring power on the legislature, the rule of construction applicable to similar provisions in municipal charters, as laid down in *Dillon on Municipal Corporations*, (*4th ed. Sec., 328,*) namely, that what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy, but where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then an ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid. (*Linford vs. Ellison, 155 U. S., 507.*)

People vs. Daniels, 6 Utah, 288.

Linford vs. Ellision, 7 Utah, 166.

Baca vs. Perez, 8 N. M., 187.

V.

Appellee is not authorized to exercise the power of eminent domain.

It is undoubtedly true that the legislature of the Territory of New Mexico has authorized the use of this power, by corporations formed for the purpose of constructing irrigating canals and has thus closed the door to inquiry by the courts as to whether or not irrigating canals constitute such public use as authorizes the taking of private property therefor, without the owner's consent, upon the payment of just compensation. When, however, this particular company comes into a court of justice, asking the aid of the court to restrain the appellants and their associates from interfering with it in the exercise of this power and the appellants and their associates challenge the right to do the acts, the doing of which they have resisted, the existence of the right, becomes at once the subject of judicial inquiry. The use to which appellee proposes to put the land, sought to be surveyed, and eventually taken, and whether such use is in fact public becomes a judicial question; no declaration of the objects and purposes of the company in its articles of incorporation can give it public character, so as to entitle it to exercise the high prerogative of sovereignty, invoked in aid of its enterprise, unless it is in fact public.

The right of the appellee to exercise the power of eminent domain depends upon its

ability to show affirmatively that it is organized to serve the public and not merely for private gain. That such a company derives profit from its service to the public constitutes no argument against its right to exercise the power, if the ability and intent to serve the public are shown, but in this case neither the ability nor the intent has been shown. On the contrary from the facts found it is entirely clear that this is a purely speculative enterprise which seeks by taking advantage of natural conditions arising out of the topography of the country and the peculiar conditions surrounding the cultivation of the lands by means of irrigation, to compel the owners of the soil to abandon means of irrigation entirely satisfactory to them and to adopt others alleged to be more progressive.

> "The right of the state to authorize the condemnation of private property for the construction of railroads and to delegate the power to take proceedings for that purpose to railroad corporations, has become an accepted doctrine of constitutional law and is not open to debate. But the power is dormant until the legislature authorizes its exercise, and the particular corporations which claims the right to exercise the power must be able to show a legislative warrant, and that be shown, it must be able, further to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes, or that the business which it is organized

to carry on, is public, and that the taking of private property for the purposes of the corporation is a taking for public use. The general principle is now well settled that when the uses are in fact public, the necessity or expediency of taking private property for such uses by the exercise of the power of eminent domain, the instrumentalities to be used and the extent to which such right shall be delegated are questions appertaining to the political and legislative branches of the government, while on the other hand the question whether the uses are in fact public, so as to justify the taking *in invitum* of private property therefor is a judicial question to be determined by the courts. * * * ."

"If the question, whether the purposes and objects for which the petitioner, The Niagara Falls and Whirlpool Railway Company is organized, are public, so as to justify the exercise in its behalf of the right of eminent domain, is controlled and is to be tested exclusively by the description of those objects and purposes as they are set forth in its articles of association, there could be no hesitation in concluding that the company is entitled to take the proceedings now in question, unless, as is claimed, the particular property now sought to be taken is, on special grounds, exempt from condemnation. Looking at the articles of incorporation alone it appears that the company is a railroad corporation organized under the General Railroad Act for 'public use in transporting persons and property' by a railroad to be constucted between certain termini. The papers on their face show that the corpo-

ration has undertaken an ordinary railroad enterprise within the purview of the act of 1850, in aid of which the power of eminent domain may be appropriately exercised. But when we look beyond the formal documents, and the actual business proposed to be conducted is considered, we find that the proposed railroad has no proper termini; that it is not a highway in any just or proper sense; that it cannot, by reason of necessary limitations, perform one part of the duty it has undertaken, viz., the transportation of freight; that at most it can be operated but a portion of the year, and that the sole object of its construction is to enable the corporation, for a compensation to be received, to provide, for the portion of the public who may visit Niagara Falls, better opportunities for seeing the natural attractions of the locality. We feel constrained to say that in our judgment this is not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise. The right of the company being challenged on this ground, the court is compelled to consider it, and it is manifest that the inquiry is not precluded because the petitioner has organized itself under the General Railroad Act and has assumed in its articles of association the character of an ordinary railroad corporation. What is a public use is incapable of exact definition. The expressions 'public interest' and 'public use' are not synonymous. The establishment of furnaces, mills and manufactories, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie

without the domain of public uses for which private ownership may be displaced by compulsory proceedings. The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchanges, in a word they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty. In this State the duty of laying out and maintaining highways has in the main been performed directly by the State or by local authorities, but from an early day the legislature has from time to time delegated to turnpike corporations the right and duty to maintain public roads in localities, and canal companies have been organized with powers of eminent domain. It would be impossible and contrary to our usages for the state to enter upon the general business of constructing and operating railroads, and in analogy to the delegation of the power of eminent domain to turnpike and canal companies, it wisely delegates to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers and as incident thereto the right to take private property under the power of eminent domain on making compensation. In considering the question what is a public use for which private property may be taken *in invitum* Judge Cooley (*Const. Lim.*, 669) remarks, 'that can only be considered such, when the government is supplying its own needs or furnishing facilities for its citizens, in regard to these

matters of public necessity which on account of their peculiar character, and the difficulty, perhaps impossibility, of making provision for them otherwise, it is alike proper, useful and needful, for the public to provide.' Whatever rule, founded on the adjudged cases, may be formulated on this subject, it can not, we think, be framed so as to include the present case. The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls, more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one so as to justify condemnation proceedings."

Matter of Niagara Falls & Whirlpool Railway Co., 109 N. Y., 384.

On the 29th of January, 1899, the Union River Logging Railroad Company procured the then Secretary of the Interior, Mr. Vilas, to approve its map of definite location for a line of railway across the public domain in the then Territory of Washington, and proceeded to construct a railroad, appropriating the public domain for right of way under the provisions of Section 4 of the act of March 3, 1875, granting to railroads right of way across the public domain. On the 29th day of March, 1889, the incoming Secretary of the Interior, Gen. Noble, asked the opinion of the Attorney-General as to his power ot annul and cancel this approval. On the 4th of May, 1890, the Attorney-

General advised the Secretary of the Interior that he possessed the power to cancel the approval of his predecessor, and a rule was issued upon the Union River Logging Railroad Company requiring it to show cause before Secretary Noble why the said approval made by the former Secretary, Mr. Vilas, should not be revoked and annulled. The railroad company appeared and filed an answer, and, after full hearing, Secretary Noble annulled the action of his predecessor, and in his opinion said:

> "I do not think this company is of the character contemplated by the act of March 3, 1875 (18 Stats., 482) granting to railroads the right of way through the public lands.
>
> While the act does not specifically define the character of the railroads which shall be entitled to the benefits of its provisions, yet it seems clear that Congress only meant to extend the benefits of the act to such railroads as are *quasi* public corporations and are common carriers of passengers and freight, having time cards, passengers and freight tariffs, station buildings, depots, machine shops, sidetracks, turnouts and water stations for their use and operation, and for the use of the public, and such cars as are necessary for the safe and proper transportation of freight of different kinds, and the carrying of passengers over the line of such railroad. It is a railway which is of some benefit to the public that Congress desired to favor.
>
> This company is not equipped with the instrumentalities evidencing such a

corporation. It is purely a private enterprise, constructed solely for the transportation of supplies necessary to feed these mills, and make them and the traffic in logs and lumber a profitable venture.

In this proceeding the respondent company was called upon to show cause why the approval of its map of definite location should not be annulled. Under said rule it was bound to show that it was in fact such a railroad as the act of Congress extends the right of way over the public lands to, and that it was rightfully entitled to the benefits conferred by said act. It was not called on to show simply that it was organized as a railroad on paper, but a railroad in fact. Its answer is indefinite and uncertain in its statements of fact; the evidence in support of its answer fails to show that said company has any depot or freight houses or has cars suitable for carrying general freight or passengers; fails to show that said road has any schedule of rates for carrying passengers or freight; fails to show that it runs its trains upon regular trips or at stated times, for the accommodation of the general public; fails to show that it starts from or terminates at any town or city. On the contrary, it appears that said road has been in operation for several years through a scope of country heavily timbered and sparsely settled; that its business has been and consists almost altogether in transporting logs and lumber to tide water on Hood's canal. That it has been operated not as a public railroad, but as a private concern; not in the interest of the public, as a common carrier, but in the private interest of its owners and promoters.

From a careful examination of the

whole record I find: First—That at the time the respondent company filed its articles of incorporation with the register of the local land office, and at the time its map of definite location, or profile, was approved by the Secretary of the Interior, said company was not in fact such a railroad company as would be entitled to the benefits of the act of March 3, 1875, (18 Stats., 482):

Second—That the approval of the map of definite location, or profile of the respondent company's line of road made by the Secretary of the Interior, on January 29, 1889, was procured by fraud and false representations.

From the examination given the authorities, as well as upon principles of a sound public policy, and a just and proper administration the public land-laws, I reach the conclusion that in a case like the one at bar, the secretary of the Interior has the power and authority to recall, annul, and set aside the action of his predecessor in office, in approving the map of definite location or profile of a railroad company, filed under the 4th section of the act of March 3, 1875. Having the power, the case at bar calls for its exercise as a bounden duty.

It is accordingly ordered that the approval of the Secretary of the Interior, dated on the 29th day of January, 1889, of the map of definite location, or profile of the Union River Logging Railroad Company, be and the same is hereby annulled, canceled, set aside, and held for naught, and you are directed to carry out this order by causing it to be entered upon the appropriate plats and records of your

office and the proper local land office."

Union River Logging Railroad Company, 12 Land Decisions, 581.

The right of Secretary Noble to annul the approval, by his predecessor, of the map of definite location, to which the foregoing decision refers afterwards, came before this court on appeal from the decree of the supreme court of the District of Columbia, enjoining the Secretary of the Interior from executing his order revoking the approval of the map.

This court affirmed the decision of the supreme court of the District of Columbia and perpetually enjoined Gen. Noble from executing his order upon the ground that the decision of his predecessor, that the Union River Logging Railroad Company was such a corporation as was entitled to the benefits of the act of March 3, 1875, was judicial in its nature and was not subject to be annulled or set aside by a successor in office of the Secretary who made the original dicision.

Mr. Justice Brown, speaking for the Court said:

> "At the time the documents required by the act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the act of Congress. Upon being satisfied of this fact, and that all the other requirements of the act had been observed, he was authorized to approve

the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of one hundred feet on each side of the central line of the road. *Frasher vs. O'Connor, 115 U. S., 10.*"

"The position of the defendants in this connection is, that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the Secretary had no power to act, and that in this case he was imposed upon by the fradulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit. * * * *

"There is, however, another class of facts which are termed *quasi* jurisdictional which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the findings of the court is as conclusively presumed to be correct as its findings with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship or the amount in controversy in a Federal court, which,

when found by such court, cannot be questioned collaterally." * * *

> "In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding. And even if the court be imposed upon, by false testimony, its findings can only be impeached in a proceeding instituted directly for that purpose."

Noble v. Union River Logging R. R. Co.,
147 U. S., 172.

It is obvious that a right to carry water lies at the foundation of the right to construct the canal, that the utility of the canal as a public agency depends upon the existence of this right; that the right to construct the canal cannot exist independently of the right to divert and carry into and through it. There is no such similarity between such a canal and a line of railway as makes the right to construct the one in any sense the true measure of the right to construct the other.

A railway without freight or passengers to be carried would simply be a monument to the folly of its constructors, powerless for evil in the community. Not so with the proposed canal of the appellee. It would be for all ordinary purposes as impassable as the grand canon of the Colorado, except where spanned by substantial and expensive bridges. Without water it would be a public nuisance. With water it would be as it is intended to be, essentially a monopoly, not a competitor as one railroad is with another which it parallels, but,

by reason of its superior size and its crossing and re-crossing the smaller community ditches, it would render their use impracticable.

We have no finding of the dimensions of the canal of appellee except that it has a carrying capacity of 210 cubic feet of water per second and is to be thirty-five miles long. We have a finding that the thirteen community ditches now existing have an aggregate carrying capacity of 498 cubic feet of water per second and we have a further finding that the canal of the appellee will cross and re-cross one of these community ditches, to-wit, the Bernalillo ditch, nine times within a distance of one mile of its length. The findings do not show how many times it will cross and re-cross other existing community ditches nor how many times it will cross and re-cross the Bernalillo ditch in other places, nor are such findings necessary.

It seems entirely legitimate to suggest that the canals of the appellee cannot be less than seven or eight times the size of the Bernalillo ditch and it seems also fair to argue that there is a reason found in the topography of the country for this crossing and re-crossing of the Bernalillo ditch by the plaintiff's canal, which speaks volumes in support of appellants' contention that the appellee's canal is intended to monopolize the water supply and to render impossible the use of existing community ditches.

May appellee destroy means of supplying water to these lands which have existed for cen-

turies, without showing that the people who at present make use of those means and who are the only people, who can use its canal, as a substitute, desire, or are willing to use its canal when constructed?

May it, indeed, exercise the power of eminent domain and take private property for the purpose of constructing its canal without any further showing than is made in this case?

The conclusion of the courts below that appellee, by the mere filing of its articles of incorporation, became authorized to exercise the power of eminent domain, is in direct conflict with principles established by a very large number of decisions.

Weidenfeld v. Sugar Run R. Co., 48 Fed., 615.
Lumbering Co. v. Johnson, 46 Pac., 790.
In re Deansville Cem Assn., 66 N. Y., 569.
In re Eureka Basin W. & M. Co., 96 N. Y., 42.
In re Rochester H. & L. Co., 110 N. Y., 119.
In re N. Y. L. & W. Ry. Co., 99 N. Y., 12.
In re Split Rock Cable Road, 28 N. E. Rep., 506.
Apex Trans Co. v. Garbode, 52 Pac. Rep., 573.
Con. Channel Co. v. C. P. R. R. Co., 51 Cal., 269.
Coster v. Tidewater Co., 18 N. J. Eq., 54.
People ex. rel. Robinson v. R. R. Co., 53 Cal., 694.
Bridalveil v. Johnson, 46 Pac., 790.

VI.

Appellants have an absolute right to represent their associates in this litigation.

The courts below recognized the right of apellants to represent those of their associates claiming a right to the use of the waters of the Rio Grande by prior appropriation, when the appropriation was effected at any point along the line of the proposed canal of appellee, but refused to consider the rights of those persons associated with appellants, who effected their appropriation of water below the mouth of the proposed canal. The conclusion of law attacked is as follows:

> "That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff."
>
> (*Trans., p. 36*).

Looking to the opinion sent up with the transcript, we find the theory upon which this conclusion is reached, to be as follows:

> "I must decline to consider the rights of other than the defendants and those interested along the line of the proposed canal. The Court cannot consider the rights of all the appropriators of water from the Rio Grande, below the terminus of the proposed canal; 1st—because they are not parties to the suit, and therefore not subject to the orders, nor bound by the

decision of this court; 2d the testimony of Mr. Harroun as to the flow of water shows that fully as much water flows in the river at San Marcial, far below Albuquerque, as flows at Albuquerque and above during most of the year and sometimes much more, all of which tends to show that there are tributaries contributing waters to the lower part of the river that must be taken into account when the appropriators below the proposed canal are determined. If the rights of the appropriators below are affected by the diversion of water through the proposed canal, the Courts are open for the protection of their rights. This case involves the right of eminent domain over the defendants' land, or of land owners along the line of the canal, and as to that issue parties below the terminus of the ditch have no interest. The rights of parties to the use of water below the canal cannot be affected by this decision and will not be considered."

(*Trans., pp. 59-60.*)

Appellants do not understand it to be contended that the court takes judicial notice as to the physical results which are to follow from the construction of the canal in question. They know that it is seriously contended that the construction of this canal will not decrease the supply of water available for existing ditches, but they are not aware that this contention has been judicially established or that the courts below are willing to give their assent to it. It cannot be doubted that those appropriators of water whose rights were refused consideration in this case are, as riparian proprie-

tors, entitled to have the volume of the stream flow without diminution in its natural channel until and unless there has been some lawful diversion of the water above them on the stream. Can it be said that they would have no right to appeal to the courts, if the avowed purpose of appellee were, to divert the entire flow of the Rio Grande at the point where it is proposed to place the headgate of its canal, that they would be compelled to wait until such time as the diversion was actually accomplished before they could be heard? If they might resist the diversion of the entire flow, in the case supposed, may they not resist the attempt to divert the large quantity of water sought to be diverted by appellee? Can the corut say to them without a hearing "You will not be permitted to question the rights of this corporation to exercise the power of eminent domain; you are restrained from doing acts which are lawful if your contention is sound, but you cannot be heard in this case as to whether or not they are sound. You must wait until you have received actual and irreparable injury before you can have a hearing as to your rights.

Although the riparian rights of this class of the associates of appellants are clearly sufficient to give them a standing and to entitle them to be heard in this case, it is preferred to place their right upon the broad ground that the restraining order, as issued, was broad enough to subject them to punishment as for contempt, if they disregard it, and therefore entitled them to be heard

in the court issuing it when they challenge in a lawful and legitimate way the right of the court to issue the restraining order.

They sought relief against other unknown persons, and a restraining order, restraining them by name and their agents, confederates and assistants from doing the things complained of, was issued. They answering disclose the fact that their confederates, whom they designate as their associates, number many thousands of persons. In other words, that they were so numerous as to render it impracticable that they should all be brought before the court, and they assumed to defend for themselves and their said associates.

That the court will allow a portion of a great number of persons representing a common interest to sue or defend on behalf of themselves and their associates, is well established.

Smith vs. Swormstead, 16 How., 302.

United States vs. Old Settlers, 148 U. S., 480.

Courts punish persons not parties to the record for violation of their injunctions.

In re Lennon, 166 U. S., 554.

American Steel & Wire Co. vs. Wire Drawers Union, 90 Fed., 616.

It is contrary to the spirit of our institutions to permit any man to be condemned unheard. These associates of appellants, whose rights were refused consideration by the courts below, are today and so long as the judgment in this case remains unreversed, will continue, subject to be punished for contempt if they violate the injunc-

tion which they claim the trial court had no right to issue and as to which both the trial court and the supreme court have refused them a hearing.

> "In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.
>
> Whether the legal status of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all means and appliances of defense."

McVeigh v. United States, 11 Wall 267.

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural

justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard."

Windsor v. McVeigh, 93 U. S., 277.

The representative character of appellants, their common interest with all whom they claimed to represent, brings them within established rules of pleading in such cases as this.

Story Eq., Pl., Ss. 97-98.
Mitford v. Tyler, Eq., Pl., pp. 22-23-261.
Beach Mod., Eq. Prac., S. 63.
Gamble vs. San Diego, 79 Fed. R., 500.

VII.

There is nothing in the legislation of Congress which, even impliedly, recognizes the validity of the act in question.

The last paragraph of Section 18 of the Act of March 3, 1891, is as follows:

> "And the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."
>
> (*1st Supp. Rev. Stats., p. 946*).

From this language the conclusion is sought to be deduced that Congress thereby relinquished to the territorial legislature the entire control of water for irrigation and other purposes and the contention is made that this amounts to a repeal by implication of the proviso of the Desert Land Act, declaring that these waters shall remain and be held free for the appropriation and use of the public for irrigation, etc., upon which appellants rely.

The very context of the act of March 3, 1891, conclusively shows however, that it was not the purpose of Congress to authorize, or to recognize the power of territorial legislatures, to authorize, the creation of corporations with the powers sought to be conferred by the act in question. By section four of that act it is, among other things, provided:

> "Persons entering or proposing to

enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigation and reclaiming all of said tracts, and may file a joint map or maps, showing their plan of internal improvements."

This court has had occasion to consider the effect of so much of this act as grants the right of way across the public domain for canals and in the case of *Garland v. Bear Lake Irrigation Co., 164 U S., 18-19*, it said:

"So far as the public land is concerned, over or through which these ditches for the canal were dug, the statutes above cited create no title, legal or equitable, in the individual or company that simply takes possession of such land. The government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches or canals, etc., and where rights have become vested and accrued which are recognized and acknowledged by the local customs, laws and decisions of courts, such rights are acknowledged and confirmed. Under this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government in the party entering upon possession from the mere fact of such possession unaccompanied by the performance of any labor thereon.

Undoubtedly rights as against third persons are acquired by priority of possession, and the government will and does recognize such rights as between those parties. This is the principle running

through the cases cited by the counsel for appellants. In Sullivan v. Northern Spy Mining Co., 11 Utah, 438, which is one of those cases, the priority of possession of the person who entered upon the public land and dug the well was recognized as thereby making a superior title to the use of the water from the well over that acquired by a person who was the subsequent purchaser of the land from the government. In that case the well had been dug, and the condition fulfilled. If no well had ever been dug, and a reasonable time for digging it had passed, the mere priority of possession would have given no superiority of title to the land over that acquired by the grantee from the government. It is the doing of the work, the completion of the well, or the digging of the ditch, within a reasonable time from the taking of possession, that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land. Until the completion of this work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the person taking possession has not title, legal or equitable, as against the government. What, if any, equitable claims, a party might have upon the government, who did a large amount of work, but finally failed to complete the necessary amount to secure the water or right of way, it is not necessary to determine or discuss. Those equities would not, in any event, amount to an equitable title to the right of way or to the use of the water, and so need not be here considered."

Let us suppose a case of conflict between an

association of persons proposing to enter separate sections or fractional parts of section of desert lands and to construct a canal and ditches for irrigating and reclaiming all of said tracts and a corporation such as the appellee in this case, claiming its rights under the territorial legislature. Upon what principle would these conflicting rights be determined? Would a corporation, prior in time under the territorial law, acquire a superior right as against an association subsequently formed under the act of Congress above quoted? If so, the grant from the territorial legislature is a better grant than one from Congress. If not, then the grant from the territorial legislature is of no validity whatever.

In the case of *United States vs. Rio Grande Dam & Irrigation Company*, 174 U. S., 790, this court, by way of comment on the effect of this legislation, said:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. * * This legislation must be interrupted in the light of existing facts—that all through this mining region in the west were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention

to the common law rule, *which permitted the appropriation of those waters for legitimate industries.*"

In the same opinion this court said:

"Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the legislature of a territory, we do not deem it necessary for the purposes of this case to inquire. We concede arguendo that it does." (p.703).

In the case just quoted the court also said:

"To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress." (*pp.* 506-7).

Appellants insist that it is equally unreasonable to contend that Congress by this legislation intended to permit territorial legislatures to make grants of the surplus and unappropriated waters, not the property of the territories, because such grants are in derogation of the interests of all the people of the United States; tend directly to destroy the value of the public lands and to create a monopoly of the water supply, which is contrary to the policy of Congress, established by a long course of legis-

lation respecting the public domain. The local regulations to which Congress gave its assent are such regulations as permit the appropriation of waters for legitimate industries and does not extend to such regulations as permit a monopoly of the water supply for the purposes of speculation.

The object sought to be accomplished by the territorial legislature is not only not in harmony with the policy of Congress but is directly opposed to it.

Ferris vs. Higley, 20 Wall., 375.
Clayton vs. Utah, 132 U. S., 632.
Ex Parte Lothrop, 181 U. S., 113.

No effort has been made to present separately the questions arising in the cross action. If the judgment below is right as to the merits of the main case, it is undoubtedly right as to the cross-action and if it is erroneous as to the main case, it is likewise erroneous as to the cross-action.

It must be submitted that the judgment is erroneous and should be reversed and the cause remanded to the Supreme Court of New Mexico with instruction to dismiss the complaint and to award to appellants the injunction prayed for in the cross-complaint. All of which is respectfully submitted.

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Counsel for Appellants.